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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-50

RAILEX CORPORATION,
Petitioner,

versus

THE SPEED CHECK CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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The Speed Check Co., Inc., opposes the grant of a writ of certiorari in this case.

QUESTION PRESENTED

The petition in essence presents a single question for review, to-wit — Is the provision of Rule 52 of the Federal Rules of Civil Procedure that "* * * Findings of fact shall not be set aside unless clearly erroneous ..." applicable to findings of fact which were merely adopted by the district judge substantially verbatim from those submitted by one of the parties?

REASONS FOR DENYING THE WRIT

I.

The circuit courts are uniformly in accord in holding that, while the verbatim adoption of counsel's findings is disapproved and while such findings will be more narrowly construed and given less weight on review than if they are the work product of the judge himself, such findings nevertheless are the findings of the trial court which are not to be rejected summarily and which are not to be set aside unless clearly erroneous.

II.

The petition presents no novel question for decision, this Court, as noted by the Circuit Court (Appendix Page 5a), having thoroughly considered the question in the case of *United States vs. El Paso Natural Gas Co., Inc.*, 1964, 376 U. S. 651, 656, 84 S. Ct. 1044, 12 L. Ed. 2d, 12, 17, wherein the Court held:

> "[F]indings though not the product of the workings of the district court's mind, are formerly his; they are not to be rejected out-of-hand, and they will stand if supported by evidence."

III.

The question presented is not a matter of great gravity and importance.

IV.

Although the Circuit Court followed this Court in the El Paso case and affirmed its prior holdings that the findings must be tested by the standard of review mandated by Rule 52, the Court nevertheless proceeded to analyze and review each finding by the district court and, having cited evidence supporting such finding, concurred in the finding by stating, "We agree."

A reading of the opinion shows that the Circuit Court not only found that each finding made by the district court was supported by evidence and "not clearly erroneous" but the Court proceeded further and concurred in the findings of fact.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, HERBERT JOHNSON, one of the attorneys for the Speed Check Co., Inc., respondent, and a member of the Bar of the Supreme Court of the United States hereby certify that on the ____ day of August, 1972, I served a copy of the foregoing Brief of Respondent in Opposition on John M. Calimafde, counsel for Petitioner, 60 E. 42nd Street, New York, New York 10017.

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